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The Joinder of Parties in Louisiana

*Henry G. McMahon**

Under federal practice, and under modern American code procedure, parties are classified as formal, proper, necessary, and indispensable.¹ Formal parties are purely nominal ones and are procedural vehicles who have no real interest in the controversy, such as the next friend who brings a suit to enforce the rights of an infant, or a public official named as the obligee on a bond, who is the nominal plaintiff in a suit to enforce the bond for the benefit of a person in interest. Proper parties are those who are permitted to join or to be joined in the suit. Necessary parties are those whose interests in the subject matter of the controversy are separable, and whose absence would not prevent the granting of the proper relief to the parties actually joined; but who should be made parties, if their joinder is feasible, to avoid a multiplicity of actions and to effect a complete adjudication of the controversy. Indispensable parties are those whose interests in the subject matter are so interrelated that the court cannot proceed in their absence, since a complete and equitable adjudication of the controversy may not be made unless they are before the court.

Under the civil procedure of Louisiana, the classification of nominal parties has no utility, since the action must be brought by or against the real parties in interest if they have procedural capacity, or otherwise by or against their legal representatives. The concepts of necessary and indispensable parties play important roles in Anglo-American civil procedure, since the rules of compulsory joinder are bottomed upon them. These classifications should perform much the same functions in Louisiana practice, but in the past the failure of our courts to draw a clear line of demarcation between the two has often blurred and obscured their functions, and has deprived our procedure of workable and predictable rules in these areas. The proposed new Code of Civil Procedure of Louisiana, with an express recognition of the distinction between the two concepts and its incorporation of the

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1. 3 MOORE, *FEDERAL PRACTICE* 2103 (2d ed. 1948); 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* 52 (1950); CLARK, *CODE PLEADING* 158 (2d ed. 1947).

rules applicable to each, has clarified these phases of our procedural law appreciably.

PERMISSIVE JOINDER

In Continental civil procedure, the concept of cumulation of actions acts as the counterpart of both the joinder of actions and the joinder of parties of Anglo-American law. In the case of a single plaintiff uniting plural actions in the same suit against the same defendant, the striking parallel between the common law joinder of actions and the civilian cumulation of actions appears immediately. In the case of plural plaintiffs or defendants, however, the analogy between the common law joinder of parties and the cumulation of actions of civilian jurisdictions is obscured, unless we remember clearly the theoretical basis of the latter concept. In the cumulation of actions of Continental civil procedure

“the presence of a plurality of parties on one side or the other, or on both sides, actually represents in legal theory, a combination of different rights of actions. Thus, if A and B, co-creditors, are suing C and D, co-debtors, there is in this view a complex of four legally distinct controversies, that is to say: A v. C, A v. D, B v. C and B v. D, and by consequence four distinct actions united in a single suit.”²

If we accept this theoretical approach, then we have no difficulty in recognizing that substantially the same problems are presented by the union of plural actions, whether they arise through the joinder of plural actions by a single plaintiff against a single defendant, or through a plurality of plaintiffs, or defendants, or both. There was, however, a necessity for one additional rule with respect to the cumulation of actions, where there was a plurality of plaintiffs, or defendants, or both. Obviously, where A had a right of action against B, and C had a totally unconnected right of action against D, the two could not be joined in the same suit. Hence, there was a necessity for the rule that there could be no cumulation of actions by plural plaintiffs, or against plural defendants, unless there was some juridical connection between the actions.

Continental students of civil procedure have found it convenient to divide the concept of cumulation of actions, and to

2. Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 26 (1933).

speak of *objective cumulation* and *subjective cumulation*, with the former denoting the union of plural actions by a single plaintiff against a single defendant, and the term *subjective cumulation* referring to the union of actions brought by plural plaintiffs, or against plural defendants. Thus, it appears that objective cumulation is roughly the counterpart of the common law joinder of actions, while subjective cumulation embraces much the same area as the common law joinder of parties.³ In the development of the civil procedures of Germany and Italy, due to a sharper focus on the relations of the plural plaintiffs or defendants *inter sese*, the term *litisconsortium* is used instead of subjective cumulation.

Cumulation of actions has never developed in French procedural law to the extent that it has in the adjective law of other Continental countries.⁴ Long prior to the eighteenth century, Spanish procedure had accepted the concept of cumulation of

3. "These terms, however, do not precisely coincide with our 'joinder of actions' and 'joinder of parties,' respectively. For, on the one hand, there is usually included under objective cumulation the combination resulting from the interposition of a counter-claim [*reconventio*]. On the other hand, the union of separate demands in favor of different plaintiffs or against different defendants, so far as permitted, a case which in our [Anglo-American] law is referred to the head of 'joinder of actions,' here, because of the plurality of parties falls into the category of 'subjective cumulation.'" Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 26, 27 (1933).

4. The subject was recognized to some extent prior to the Revolution, for the leading procedure commentator of this period recognizes the general rule that "two or more actions which one has against another may be cumulated, that is to say, combined in the same suit, even though based on different grounds," but he immediately qualifies this by stating that, to avoid confusion on the trial, the actions cumulated must be of a similar nature. 1 PIGEAU, *LA PROCÉDURE DU CHATELET DE PARIS* 37 (1789 ed.). Only two provisions on the subject are to be found in the two great codes adopted after the Revolution: Article 1346 of the Civil Code requires the joinder of all claims by a single creditor against a single debtor which are not evidenced in writing; while Article 26 of the Code of Civil Procedure prohibits the cumulation of the possessory with the petitory action. This deficiency has been partially met through the recognition by procedural doctrine of the concepts of *cumul des actions* and *réunion de plusieurs demandes*. 1 GARSONNET ET CEZAR-BRU, *TRAITÉ THÉORIQUE ET PRATIQUE DE PROCÉDURE CIVILE ET COMMERCIALE* 691 (3d ed. 1912); 1 GLASSON ET TISSIER, *TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANIZATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE* 466-467 (3d ed. 1925).

The subject, however, has been narrowed and restricted appreciably in France by the rigid requirements of *connexité* (all connected actions must be filed in the same court). As a result, the French rules on the subject are few. In this connection, Professor Millar has observed that:

"Nowhere are the rules relating to joinder of actions so vague, on the whole, and so little the subject of discussion. . . . This dearth of precise rules, however, does not at all connote any practical imperfection of the procedure. It simply means the leaving of a wide field to the judicial discretion, and so long as this is wisely administered, the system is perhaps all the better for the added flexibility. Certainly, whatever complaints the French may make of their civil procedure, none is heard on the present score." Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 177, 181 (1933).

actions.⁵ By the end of the eighteenth century, its rules on the subject appear to have been well developed.⁶ While they concerned themselves primarily with the cumulation of plural actions by a single plaintiff against a single defendant, it is evident that cumulation included actions by plural plaintiffs or against plural defendants, for we find recognition in *Febrero* that the "plaintiff in one petition may make civil demands against a number of persons with respect to the same thing or fact or with respect to various things or facts."⁷ "What degree of connection between the different things or facts must exist . . . is not disclosed. We are probably safe in concluding however, that the rule followed was the Romano-canonical one requiring that the cumulated actions should arise *ex eodem facto*."⁸

Under O'Reilly's Proclamation, of course, the Spanish rules of procedure were in force in the colony of Louisiana during the days of Spanish dominion. Since the Practice Act of 1805 contained no rules on the subject, the Spanish principles of cumulation of action were applied here after the Louisiana Purchase, and prior to the adoption of the Code of Practice of 1825.⁹ Articles 148 *et seq.* of the Code of Practice of 1825 retained the Spanish rules of cumulation, the redactors' notes showing the *Partidas* and *Febrero* as their sources.¹⁰

There was, however, one major hiatus in the code provisions governing cumulation which was rather far-reaching. There was no express code requirement of connexity in the cumulation of actions by plural plaintiffs, or against plural defendants. As long as the sources of the code provisions remained the common knowledge of the profession in Louisiana, and as long as the profession retained the linguistic ability to work with this source material, this hiatus caused no particular difficulty. The union of actions by a plurality of plaintiffs or against a plurality of defendants was treated for a half-century as governed by the rules of cumulation of actions. Further, the jurisprudence supplied a more or less definite requirement of connexity in such cases; and while the language of these cases is not as precise as

5. See PARTIDA 3.10.7; HEVIA BOLAÑOS, CURIA FILIPICA 63-65.

6. See FEBRERO, LIBRERIA DE ESCRIBANOS, Parte II, Lib. III, Tom. I, nos. 67 *et seq.*, pp. 57 *et seq.* (1790 ed.).

7. FEBRERO, *op. cit. supra*, no. 67, at 61.

8. Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 177, 194 (1933).

9. Jackson v. Larche, 11 Mart.(O.S.) 284, 287-289 (La. 1822); Cross v. Richardson, 2 Mart.(N.S.) 323, 324-325 (La. 1824).

10. PROJET OF THE CODE OF PRACTICE OF 1825, 27, 38 (Official Reprint, 1938).

might be desired, there appears in the jurisprudence of this period a groping towards the idea that all of the actions sought to be cumulated by plural plaintiffs or against plural defendants must arise from the same facts.¹¹

The first indication of the competing influence of Anglo-American law in this field appeared in 1856, when for the first time we find the common law terminology "misjoinder of parties" employed by the court as a synonym for improper cumulation against plural parties.¹² Subsequent cases continued the practice,¹³ and somewhat later we find express judicial recognition of the "exception of misjoinder of parties."¹⁴ During this period, the jurisprudential requirement of connexity undergoes a restatement rather than a change. The claims may not be cumulated in the same suit unless the parties joined have a "community of interest,"¹⁵ a "common interest,"¹⁶ a "mutuality of interest,"¹⁷ or unless the claims are of "cognate origin"¹⁸ — the latter appearing to be identical with the Romano-canonical requirement that the actions arise *ex eodem facto*. In this period, our courts experienced little difficulty with the union of plural actions in the same suit. The simple rules of cumulation expressed in our Code disposed of the problems presented in the cumulation of plural actions by a single plaintiff against a single defendant. These same principles, plus the jurisprudential requirement of connexity, provided workable solutions of problems presented through the cumulation of actions by plural plaintiffs or against plural defendants. Although the terms "joinder of parties" and "misjoinder of parties" were being used increasingly, there had not yet been any attempt made to apply the common law rules of joinder of parties.

*Gill v. City of Lake Charles*¹⁹ is generally regarded as the leading Louisiana case on the subject of "joinder of parties." Insofar as the rules there recognized and applied are concerned,

11. See *Kennedy v. Oakey*, 3 Rob. 404 (La. 1843); *Mavor v. Armant*, 14 La. Ann. 181, 182 (1859); *Dyas & Co. v. Dinkgrave*, 15 La. Ann. 502, 77 Am. Dec. 196 (1860).

12. *Brewer v. Cook*, 11 La. Ann. 637 (1856).

13. *State v. Wrotnowski*, 17 La. Ann. 156 (1865); *Favrot v. Parish of East Baton Rouge*, 30 La. Ann. 606 (1878).

14. *Cane v. Sewall*, 34 La. Ann. 1096 (1882).

15. *Favrot v. Parish of East Baton Rouge*, 30 La. Ann. 606 (1878).

16. *State v. Shakspeare*, 43 La. Ann. 92, 8 So. 893 (1890).

17. *State ex rel. Johnson v. State Tax Collector*, 39 La. Ann. 530, 2 So. 59 (1887).

18. *Riggs v. Bell*, 39 La. Ann. 1030, 3 So. 183 (1887).

19. 119 La. 17, 43 So. 897 (1907).

this case well merits the honor, for these rules are completely workable. The test of "common interest" there applied is that of the earlier cases; and while the term is so broad as to defy precise definition, this very fact accounts for its workability. In an area where the desirability of joinder depends upon the facts of the particular case, rules of thumb cannot possibly be applied. Further, the recognition in the *Gill* case of a considerable measure of judicial discretion vested in the trial judge to permit or preclude the joinder is an added assurance of workability. The real objection to improper joinder is the increased inconvenience and difficulty on the trial, and here the trial judge is in a better position to judge the effect than anyone else.

Had the case gone no further, it certainly would not have caused any difficulty in the future, but unfortunately the organ of the court in the *Gill* case thought it necessary to determine the origin of the rules which he applied, and included in his opinion the following language, which has been quoted or paraphrased in many of the subsequent cases:

"The Code is singularly silent on the subject of joinder of parties. The provision bearing nearest upon the subject is that contained in article [148] *et seq.*, dealing with 'Cumulated Actions,' where the cumulation of several demands is expressly authorized, provided they are not inconsistent. This, apparently, leaves the door open for several plaintiffs to join their suits against several defendants, regardless of privity or connection between them, so long as the demands are not inconsistent. But no one ever understood that the intention was to sanction anything of that kind, and this court soon had occasion to discountenance such a practice, declaring that it was 'at variance with well-settled rules of pleading' . . . , and that the 'law' did not favor 'a multiplicity of actions against different parties in the same suit.' . . . But the court did not say where this 'law' and these 'well-settled rules of pleading' were to be found.

"We look in vain for them in the Spanish and French systems of procedure prevailing at the time of the adoption of our Code of Practice; but we find them *in the common-law books*. . . ." ²⁰ (Emphasis added.)

Actually, what the court meant by the italicized language just above was not common law procedure, but rather the equity

20. *Id.* at 19-20, 43 So. at 898.

precedents of Anglo-American law, since the only non-Louisiana cases cited and discussed in the opinion are equity cases on the subject of multifariousness. Since chancery practice had much the same foundation in Romano-canonical procedure as did Louisiana practice, multifariousness applied negatively the test of "community of interest" or "common interest" of the earlier Louisiana cases. Equity principles of multifariousness are quite similar to the rules of cumulation of actions, but both are poles apart from the common law rules of joinder of parties.

A quarter of a century later, in *Dubuisson v. Long*,²¹ the language of the *Gill* case quoted above is paraphrased as follows:

"We look in vain, not only to our Code of Practice, but to our reported cases, for a rule of procedure to guide us in a case where an exception of misjoinder is filed and insisted upon by those of the defendants who are properly joined as such, because another defendant or other defendants are improperly joined. But in the absence of such a rule laid down in our books, we follow that which prevails *at common law*. . ."²² (Emphasis added.)

In this paraphrase, the language of the *Gill* case acquires a completely different meaning. In the *Gill* case, the ambiguous words "common-law books" actually meant equity precedents on the subject of multifariousness. In the *Dubuisson* and subsequent cases, it came to mean common law cases on the subject of joinder of parties.

In the *Dubuisson* case, the plaintiff sought recovery against three defendants in solido. Recovery was sought against two of the defendants under the theory that they were liable in contract; while recovery against the third defendant for the same amount was pitched on the theory of quasi-delictual responsibility. Assuming that the petition stated a cause of action against the three defendants, the joinder should have been permitted under the prior Louisiana cases, as the actions cumulated arose out of the same facts. The trial court sustained exceptions of misjoinder of parties filed by the two defendants against whom recovery was sought *ex contractu*. The Supreme Court apparently assumed that there was a misjoinder, but reversed and remanded the case under an application of the settled common

21. 175 La. 564, 143 So. 494 (1932).

22. *Id.* at 568, 143 So. at 496.

law rule of joinder of parties that a defendant who is properly joined cannot complain of the misjoinder of other defendants. Exactly the opposite result had been reached in an earlier Louisiana case,²³ which was not called to the attention of the court.

The result reached by the court, through this curious cancellation and offsetting of errors, was correct. The alarming feature of the case was the court's failure to realize the utter impossibility of applying common law rules of joinder of parties to Louisiana cases. However much these common law rules may have been criticized because of their harshness, technicality, and inflexibility, they do have one virtue — simplicity of application. All joint creditors must join in the suit; and all joint debtors in the jurisdiction must be joined in the suit. Several creditors cannot join, and several debtors cannot be joined, in the same suit but must sue or be sued severally (separately). Hence, under the common law, if *A* sues *B* and *C* (joint debtors), and joins *D* (liable only severally on the same cause of action) in the same suit, it is easy to determine which defendants are properly joined and which defendant is improperly joined. Common law rules of joinder of parties cannot be applied in Louisiana for the very simple reason that the concepts of substantive law on which they are based are completely foreign to the law of this state. The only similarities between the joint obligation and the several obligation of Anglo-American law, and those of Louisiana, are the names.²⁴ If we attempt to apply these rules to Louisiana cases, we are forced into agreement with Judge (now Mr. Justice) McCaleb that "there must often arise cases in which the question [of determining which party is improperly joined] would present great difficulty."²⁵

In the *Dubuisson* case, the two defendants sued *ex contractu* were not complaining of their joinder *inter sese*; they were complaining of their joinder with the third defendant. How did the court conclude that these two defendants were properly joined, and the third defendant was improperly joined? The court simply counted noses. But suppose the noses on both sides of the fence are equal; what then? Exactly such a situation was presented

23. *Waldo & Hughes v. Angomar*, 12 La. Ann. 74 (1857).

24. For a discussion of the differences between these obligations in Anglo-American and Louisiana law, see Comment, *Substantive and Procedural Aspects of Joint, Several, and Joint and Several Obligations*, 14 LOUISIANA LAW REVIEW 828 (1954).

25. *Gates v. Bisso Ferry Co.*, 172 So. 829, 832 (La. App. 1937).

in the *Zettwoch* case,²⁶ where thirteen defendants were on one side of the fence, and thirteen on the other. The court, being unable to determine which of the defendants were properly joined and which were not, dismissed the case. A combination of this reasoning with the rule of the *Dubuisson* case, however, leads us into a vicious circle: If the court cannot determine which of the defendants are properly joined and which are not, how can the court determine which of the defendants have a right to except to the misjoinder?

A more serious effect of the misinterpretation of the *Gill* decision, and of the application of common law rules of joinder, is seen with respect to the penalty for improper joinder. Under Article 152 of the Code of Practice, the penalty for improper cumulation is to require the plaintiff to amend his petition and elect as to which of the actions improperly cumulated he shall proceed with. The earlier cases considered this required election, and not the dismissal of the suit, as the proper penalty for improper cumulation by or against plural parties.²⁷ The later cases, apparently because of the mistaken belief that the common law rules of joinder of parties were to be applied, dismissed the suit when it was found that the parties were improperly joined.²⁸

Fortunately for Louisiana practice, despite the repetition of the statement of the applicability of the common law rules of joinder of parties, these rules have not been applied except in the two areas indicated above. It will not be a difficult matter to restore to Louisiana the traditional rules of cumulation of actions. These principles are so simple, so easy to apply, and so conducive to an efficient administration of justice that we would sustain a great loss if, for any reason, there is a failure to restore them.

COMPULSORY JOINDER

The courts of every procedural system refuse to adjudicate an action unless all persons whose interests in the controversy

26. *Delesdernier Estate v. Zettwoch*, 175 So. 137 (La. App. 1937).

27. *St. Geme v. Boimare*, 117 La. 232, 41 So. 557 (1906). *Cf. Cane v. Sewall*, 34 La. Ann. 1096 (1882); *Briel v. Postal Telegraph Co.*, 112 La. 412, 36 So. 477 (1904).

28. *Davidson v. Frost-Johnson Lumber Co.*, 126 La. 542, 52 So. 759 (1910); *Davidson v. Fletcher*, 126 La. 535, 52 So. 761 (1910); *Strong v. Robbins*, 137 La. 680, 69 So. 93 (1915); *McGee v. Collins*, 156 La. 291, 100 So. 430 (1924); *Babincaux v. Miller*, 5 La. App. 605 (1927); *Copellar v. Britt*, 188 So. 403 (La. App. 1939); *Delesdernier Estate v. Zettwoch*, 175 So. 137 (La. App. 1937). *Cf. Courtney v. Louisiana Ry. & Navigation Co.*, 131 La. 575, 59 So. 994 (1912).

would be directly or immediately affected by any judgment which might be rendered are before the court. Here, in Anglo-American law the rules relating to indispensable parties find application. Similarly, all procedural systems find it desirable either to require conditionally, or at least to encourage, the joinder of all interested persons in the same suit, even though the interests of the persons not joined are separable and will not prevent the court from adjudicating the action. Here, the joinder, while not absolutely indispensable, is necessary to avoid a multiplicity of actions and to permit an adjudication of the entire controversy in a single suit, or to prevent harassment of or other prejudice to a defendant. Here, in Anglo-American law the rules relating to necessary parties provide the solution of problems presented.

Under Anglo-American law, the principles relating to the joint, and the joint and several, obligation account in a large measure for the rules of compulsory joinder. An obligation in favor of joint obligees is due, not to any particular obligee, but to all collectively. Hence, all joint obligees are indispensable parties who must join in a suit to enforce the obligation, and the court cannot render a judgment in the absence of any. On the other hand, the entire obligation of joint obligors is due by each. Hence, the interests of the joint obligors are to that extent separable, and there is no absolute requirement of the joinder of all. But, to permit the adjudication of the entire controversy in a single suit, and to prevent an unnecessary multiplicity of actions in the enforcement of contribution, it is desirable to have all joint obligors joined in the suit. Therefore, all of the joint obligors are considered necessary parties; and a defendant in such a case is permitted to complain of the nonjoinder of the other joint obligors, and to require their joinder if they are subject to the jurisdiction of the court. Under the Anglo-American joint and several obligation, the latter may be enforced either jointly or severally, at the option of the creditor. A creditor may elect to sue his joint debtors either jointly or severally, but he may not sue some jointly and the others severally.²⁹

Nothing in the substantive rules relating to the joint, or to the solidary, obligation of Louisiana requires the adoption of similar rules of compulsory joinder. The former, which is the conjoint obligation of the civil law, is in no sense a collective obligation, but is divisible both as to obligees and obligors. A

29. See Comment, *Substantive and Procedural Aspects of Joint, Several, and Joint and Several Obligations*, 14 LOUISIANA LAW REVIEW 828 (1954).

joint obligee is entitled to receive his virile share of the obligation, and nothing more. A joint obligor is liable for his virile share of the obligation, and nothing more. Here, there is neither the need for, or the possibility of, enforcing contribution. A solidary obligation may be enforced against one or more of the solidary obligors, but there is no requirement of the joinder of all in the same suit. The rules of compulsory joinder in Louisiana, therefore, rest upon purely procedural bases.

While there has been no consistent recognition of the concepts of indispensable and necessary parties by the positive law of Louisiana, these two concepts have been recognized and utilized by the jurisprudence whenever necessary. Unfortunately, none of the decided cases in this state has attempted to define these concepts; and the failure of the courts to use precise terminology consistently and to recognize the differences between the two, has left the jurisprudence of the state in an unsatisfactory condition. Thus, in both *Ashbey v. Ashbey*³⁰ and *Succession of Todd*,³¹ the court recognized and utilized the concept of indispensable parties, without expressly labeling it as such. In both cases, the suit was dismissed because all parties whose rights would be immediately and directly affected by any judgment which might be rendered were not before the court. Even though the defendant's exception of nonjoinder of parties defendant was not before the appellate court in either case, on its own motion in both cases, the appellate court noticed the absence of the parties not joined, and refused to adjudicate the action. But at least three more recent cases have recognized and properly labeled the concept of indispensable parties.³² On the other hand, the concept of necessary parties has been expressly recognized and properly labeled in *Reed v. Warren*³³ and its progeny.³⁴

30. 41 La. Ann. 138, 5 So. 546 (1889).

31. 165 La. 453, 115 So. 653 (1928). See also the cases cited in McMAHON, LOUISIANA PRACTICE 412, n. 73 (1939).

32. Baton Rouge Production Credit Ass'n v. Alford, 235 La. 117, 102 So.2d 866 (1958); State v. Ferris, 227 La. 13, 78 So.2d 493 (1955); Horn v. Skelly Oil Co., 221 La. 626, 60 So.2d 65 (1952).

33. 172 La. 1082, 136 So. 59 (1931).

34. Board of Com'rs v. New Orleans, 223 La. 199, 65 So.2d 313 (1953); Wolfson v. Lisso's Succession, 207 La. 67, 20 So.2d 427 (1944); De Hart v. Continental Land & Fur Co., 196 La. 701, 200 So. 9 (1940); Pierce v. Robertson, 190 La. 377, 182 So. 544 (1938); Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 150 So. 855 (1933); Gabriel v. United Theatres, 50 So.2d 514 (La. App. 1951); Harris v. Lumbermen's Mutual Casualty Co., 48 So.2d 728 (La. App. 1950); Thompson v. Kivett & Reel, 25 So.2d 124 (La. App. 1946); Wolfson v. Succession of Lisso, 13 So.2d 521 (La. App. 1943); Ott v. Grace, 13 So.2d 138 (La. App. 1943). See also Thornton v. Peak, 191 So. 182 (La. App. 1939).

Originally in Louisiana, there was a required joinder of both joint obligees³⁵ and joint obligors.³⁶ But since such a joinder was not required by the rules of our substantive law, in due time both requirements were abandoned.³⁷ The avoidance of an unnecessary multiplicity of actions, and preventing the harassment of the defendant, however, are compelling procedural reasons for a requirement of the joinder of all interested parties. These factors accounted for the reversal in the jurisprudence of Louisiana in *Reed v. Warren*,³⁸ where the Supreme Court held that all of the beneficiaries named in Article 2315 of the Civil Code as entitled to bring an action for wrongful death were necessary parties to an action to recover damages therefor, and on timely exception of the defendant, were required to be made parties to the suit. At least one subsequent decision³⁹ provides a basis for the argument that in all cases, on timely exception of the defendant, all interested parties must be joined in the litigation.

The procedure for raising the objection of the lack of indispensable parties, or for the failure to join a necessary party, has caused difficulty in Louisiana. Under the jurisprudence, one exception, that of nonjoinder of parties, has been utilized for both purposes. This exception has long been recognized as a dilatory one which must be pleaded prior to the filing of an answer or a default; otherwise the objection is waived.⁴⁰ These rules make the exception admirably suited for raising the objection of the nonjoinder of a necessary party, but completely unsuitable for raising the objection of the lack of indispensable parties. In the latter case, the defect may not be waived by the defendant, and if he fails to object thereto, it may be noticed by the court on its own motion. Hence, the objection of the lack of indispensable parties should be a peremptory, rather than a dilatory, exception. Raising the objection through the dilatory exception of non-

35. *Alling v. Woodruff*, 16 La. Ann. 6 (1861).

36. LA. CIVIL CODE arts. 2080, 2081 (1825); LA. CIVIL CODE arts. 2085, 2086 (1870).

37. *Alling v. Woodruff*, 16 La. Ann. 6 (1861) was overruled in *Hincks v. Converse*, 38 La. Ann. 871 (1886); and LA. CIVIL CODE arts. 2085, 2086 (1870), were impliedly repealed by La. Acts 1870 (E.S.), No. 103, § 2.

38. 172 La. 1082, 136 So. 59 (1931).

39. *Pierce v. Robertson*, 190 La. 377, 182 So. 544 (1938).

40. *Moore v. Gray*, 22 La. Ann. 289 (1870); *Dyer & Stevenson v. Drew*, 14 La. Ann. 657 (1859); *Brewer v. Cook*, 11 La. Ann. 637 (1856); *Rothschild v. Bowers*, 2 Rob. 380 (La. 1842). See also *Carolina Portland Cement Co. v. Southern Wood D. & F. Co.*, 137 La. 469, 68 So. 831 (1915); and *Dunbar v. Murphy*, 11 La. Ann. 713 (1856).

joinder of parties has resulted in confusion and has presented difficulties.⁴¹

JOINDER UNDER THE PROPOSED NEW CODE

The proposed Code of Civil Procedure of Louisiana seeks to retain the simplicity and workability of the original rules of permissive joinder, but to fill in the hiatuses in the articles of the Code of Practice which have caused so much difficulty in the past. Thus the initial article in the proposed new Code on cumulation of actions makes it clear that the subject includes plural actions both by a single plaintiff against a single defendant and by or against plural parties.⁴² The succeeding article⁴³ states the requirements of cumulation by a single plaintiff against a single defendant, and is further declaratory of the settled jurisprudential rule that inconsistent or mutually exclusive actions may be cumulated in the alternative. The hiatuses in our present positive law are filled in by the provisions of Article 463, stating expressly the rules governing cumulation by plural plaintiffs or against plural defendants:

"Two or more parties may be joined in the same suit, either as plaintiffs or as defendants, if:

"(1) There is a community of interest between the parties joined;

"(2) Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and

"(3) All of the actions cumulated are mutually consistent and employ the same form of procedure.

"Except as otherwise provided in Article 3660,⁴⁴ inconsistent and mutually exclusive actions may be cumulated in the same suit if pleaded in the alternative."

41. See *De Hart v. Continental Land & Fur Co.*, 196 La. 701, 200 So. 9 (1940); *Ott v. Grace*, 13 So.2d 138 (La. App. 1943).

42. Article 461 defines cumulation of actions as "the joinder of separate actions in the same judicial demand, whether by a single plaintiff against a single defendant, or by one or more plaintiffs against one or more defendants."

43. Article 462 provides that:

"A plaintiff may cumulate against the same defendant two or more actions even though based on different grounds, if:

"(1) Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and

"(2) All of the actions cumulated are mutually consistent and employ the same form of procedure.

"Except as otherwise provided in Article 3660, inconsistent or mutually exclusive actions may be cumulated in the same judicial demand if pleaded in the alternative."

44. Article 3660 retains the present prohibition against the cumulation of the petitory and possessory actions, even in the alternative.

To grant greater discretion to the trial court, as well as to provide a penalty where one of the actions cumulated is not within the jurisdiction of the court or is filed in an improper venue, the present penalties for an improper cumulation are modified in Article 464, which provides that:

"When the court lacks jurisdiction of, or when the venue is improper as to, one of the actions cumulated, that action shall be dismissed.

"When the cumulation is improper for any other reason, the court may: (1) order separate trials of the actions; or (2) order the plaintiff to elect which actions he shall proceed with, and to amend his petition so as to delete therefrom all allegations relating to the action which he elects to discontinue. The penalty for noncompliance with an order to amend is a dismissal of plaintiff's suit."

For years, in the procedure of both common law and civilian jurisdictions, a misjoinder of parties (or an improper cumulation of actions by or against plural parties) was regarded as presenting a problem of pleading. It is now recognized in jurisdictions of both systems that the problem actually presented is a matter of inconvenience on the trial.⁴⁵ Hence, under Article 464, the trial court is not compelled to require the plaintiff or plaintiffs to elect if there is no community of interest between the parties joined as plaintiffs or defendants, but the court may simply order the separate trial of the actions improperly cumulated. This inconvenience at the trial may present itself in cases where the defendant has failed to except to the improper cumulation, and even in cases where there is the necessary community of interest. Article 465 grants the trial judge discretion to order separate trials in both instances.⁴⁶

The proposed new Code has a chapter on "Joinder" in its title on "Parties." In an abundance of caution, and to avoid any possibility of the Bench and Bar of Louisiana failing to appreciate the fact that permissive joinder is governed by the rules of cumulation of actions, an article⁴⁷ of this chapter provides that:

45. See, for instance, FED. R. CIV. P. 21; ILLINOIS CIVIL PRACTICE ACT, § 44; ITALIAN CODE OF CIVIL PROCEDURE art. 103.

46. "When the court is of the opinion that it would simplify the proceedings, would permit a more orderly disposition of the case, or would otherwise be in the interest of justice, at any time prior to trial, it may order a separate trial of cumulated actions, even if the cumulation is proper."

47. Article 647.

"The permissive joinder of two or more plaintiffs or defendants in the same suit is governed by the rules regulating the cumulation of actions provided in Articles 463 through 465."

Little change is made in the proposed new Code in the rules of compulsory joinder, heretofore to be found only in the jurisprudence. Definitions of indispensable and necessary parties, heretofore not available even in the case law of Louisiana, are to be found in the new Code. Article 641 defines indispensable parties,⁴⁸ and is further declaratory of the settled jurisprudential rule that "no adjudication of an action can be made unless all indispensable parties are joined therein." The succeeding article defines necessary parties,⁴⁹ and otherwise is declaratory of the jurisprudence in providing that:

"An adjudication of an action may be made even if all necessary parties are not joined therein, but when timely objection is made to the nonjoinder of a necessary party the court shall require his joinder if he is subject to its jurisdiction."

As under the present law, all solidary obligees or obligors are not to be deemed necessary parties.⁵⁰ A change of the law would be made in the proposed new Code with respect to joint obligees and obligors. Here, to avoid a multiplicity of actions and to prevent the harassment of a defendant, there is a reversion to the original rules obtaining in Louisiana, and all joint obligees or obligors are deemed to be necessary parties.⁵¹ Provision is also made in one article for the case where an indispensable or necessary party who should join as a plaintiff refuses to do so. This

48. The code definitions of indispensable and necessary parties are based upon those of the United States Supreme Court in the leading case of *Shields v. Barrow*, 17 How. 130 (1854), which have been applied consistently in the federal courts. See 3 MOORE, *FEDERAL PRACTICE* 2150 (2d ed. 1948); 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* 52 (1950).

Article 641 defines indispensable parties as "those whose interests in the subject matter are so interrelated, and would be so directly affected by the judgment, that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action."

49. Article 642 defines necessary parties as "those whose interests in the subject matter are separable and would not be directly affected by the judgment if they were not before the court, but whose joinder would be necessary for a complete adjudication of the controversy."

50. "One or more solidary obligees may sue to enforce a solidary right, and one or more solidary obligors may be sued to enforce a solidary obligation, without the necessity of joining all others in the action." Art. 643(2).

51. "All joint obligees are necessary parties to an action to enforce a joint right, and all joint obligors are necessary parties to an action to enforce a joint obligation." Art. 643(1).

article is declaratory of the present jurisprudential rule that he may be joined as a defendant, and required to assert his rights in the action or be precluded thereafter from asserting them.⁵²

The difficulties in the present law presented by the defendant's use of the exception of nonjoinder of parties to complain of the plaintiff's failure to join either an indispensable or a necessary party are removed by Article 645 of the new Code, which provides that:

"The failure to join an indispensable party to an action may be pleaded in the peremptory exception, or may be noticed by the trial or appellate court on its own motion.

"The failure to join a necessary party to an action may be pleaded only in the dilatory exception."

Liberality of amendment to join an indispensable or a necessary party not joined initially is consecrated by one of the provisions of the proposed Code of Civil Procedure. Article 646 provides that:

"When the failure to join an indispensable party is pleaded successfully in or noticed by a trial court, the latter may permit amendment of the petition so as to make him a party, and may reopen the case if it has been submitted and further evidence is necessary. When such failure is pleaded successfully in or noticed by an appellate court, the latter may remand the case for such amendment and further evidence.

52. Art. 644: "If an indispensable party, or a necessary party subject to the jurisdiction of the court, who should join as a plaintiff refuses or fails to do so, he may be joined as a defendant and required to assert his rights in the action or be precluded thereafter from asserting them."

This article adopts the solution of the problem suggested in *Reed v. Warren*, 172 La. 1082, 136 So. 59 (1931).

Since the action may proceed without a necessary party who is not subject to the jurisdiction of the court, and his joinder could not be required under Article 642, no problem is presented by the rare case where a nonresident who is a necessary party plaintiff refuses or fails to sue.

The equally rare case where a nonresident who is an indispensable party plaintiff refuses or fails to sue presents much more of a problem. Some doubt exists as to whether such a nonresident may be joined as a defendant. It is believed, however, that the probabilities are that in such a case he may be joined, and served through an attorney at law appointed by the court to represent him. In such a case the incorporeal right is a *res*; and since the alleged obligor is subject to the jurisdiction of the Louisiana court, the *res* has a situs in this state; and a Louisiana court would have jurisdiction to compel the nonresident to assert his rights in the pending action. *Of. Herbert v. American Soc. of Composers, etc.*, 210 La. 240, 26 So.2d 732 (1946). A contrary view might make it impossible for the plaintiff in the pending suit to enforce his right anywhere.

"When the failure to join a necessary party is pleaded successfully, the court shall permit an amendment of the petition to join him."

Thus, in ten relatively short articles in the proposed Code of Civil Procedure, the Louisiana State Law Institute seeks to provide simple and workable rules on the subject of joinder of parties to replace the unsatisfactory and often obscure rules of our present procedural law. There is no thought or pretension that under these proposed rules an attorney will be able to insert a coin in a slot and come up with the correct answer to any question which may arise. In this area of the procedural law there can be no rules of thumb. These articles were advisedly made very broad, and are intended to grant a very considerable measure of judicial discretion to the trial court in administering them. There will be borderline cases in the future where it will not be easy to decide whether there is a community of interest⁵³ between the parties joined, and where it will not be a simple matter to determine whether a person not joined in the action is either an indispensable or a necessary party. These difficulties could be eliminated only by procedural rules so rigid and inflexible that they would prove to be completely unworkable. The articles recommended by the Law Institute in this field are broad and flexible enough to be workable, yet definite and clear enough to be easy to administer in the great majority of cases.

53. The Law Institute recommended the retention of the community of interest test of the joinder of parties, rather than the test of Federal Rule 20(a) "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action," for the reason that it was broader and more flexible than the latter.